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ABSTRACT

Progress has been made in civil rights and civil equality since 1964. Euphemisms in language, however, continue to impede the achievement of an end to discrimination in America. Examples of such vague and euphemistic terms are expressions such as "reverse discrimination" and "affirmative action," which fail to remind Americans that present discrimination must be eradicated not only in words but also in fact. A number of court cases on reverse discrimination (the Bakke case, for example) tend to obscure the real problems of the cumulative effects of racism and discrimination against minorities. (MC)

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REMARKS

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BEFORE THE

INTERNATIONAL ASSOCIATION OF OFFICIAL
HUMAN RIGHTS AGENCIES

AT THE

WASHINGTON PLAZA HOTEL
SEATTLE, WASHINGTON

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U.S. DEPARTMENT OF HEALTH,
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LANGUAGE LACKING DISCRIMINATION

Justice Thurgood Marshall writing separately in the Bakke case stated:

> "The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro."

Can any of you explain to me why Allan Bakke was not black? The answer is complicated, isn't it? As a lawyer, I am trained to explain complicated subjects, to make distinctions of the nicest kind, to convince others that what appears to be reality and truth is not. So, I can answer my own question, if I really try. But I always come away each time I do, even if everyone else seems satisfied, feeling that something is not quite right.

After all, as late as 1964, Congress believed it necessary to enact a major civil rights law to counter pervasive racial discrimination in public accommodations, public schools, use of federal funds and racial and sex discrimination in private employment. In 1965, Congress took drastic action to ensure that blacks were not systematically deprived of the right to vote. In 1968, it determined that only a strong law prohibiting discrimination in housing could insure that minorities found places to live based upon the color of the money in their hands, not the color of their skins. It was not until 1971 that major strides toward

desegregation of large urban school districts began. Only six years ago, Congress found that federal legislation was needed to attack discrimination in public employment. Prior to 1975 language minorities were not adequately protected by federal law with respect to exercise of the franchise. In 1976, I tried a case against a state higher education system that resulted in a federal court's finding that state officials had intentionally maintained segregated facilities. And last year, HEW took administrative action against six state university systems that it found operated institutions in a manner that perpetuated segregated patterns.

Could it be possible that we have, in less than 15 years, ended all discrimination against minorities and women and placed all persons, irrespective of race, creed, color, national origin or sex on an equal footing? I think not:

- In 1974, blacks constituted only 11 percent of the population but one-third of all Americans living below the official "poverty line" of just over $5,000 for a non-farm family of four;
- In 1975, four out of ten black children, as compared to one out of every ten white children, were being raised in poverty;
- In November 1977, the official unemployment rate for black teenagers was 39 percent;
- Today, at least 80 percent of all American families live in segregated neighborhoods, white or black;

- In 1974, women's incomes were 63 percent of men's incomes;
- American Indians have the lowest income of any group in America and their unemployment rate is 3.6 times the national average;
- While blacks and Spanish-surnamed Americans increased their participation in the work force from 1966 to 1976, the gains were made primarily in low paying blue collar and service worker positions;
- A couple of years ago, the Equal Employment Opportunities Commission calculated that it would take blacks 40 years to reach parity with whites in the American work force given the rate of black advancement.

These are the hard, bitter facts. Yet, were one to try to assess the status of minority and female advancement in America based upon cases acted on by the Supreme Court this past term, the figures I have just recited would seem stranger than fiction. From the fact that a white male was suing to obtain admission to medical school alleging that minorities were preferred over him, one might conclude that blacks no longer rely largely upon Howard and Meharry for medical education and now enter other schools in large numbers to the point of squeezing out non-minority candidates. Untrue. Blacks

still constitute less than 5% of medical school enrollments despite increases in the number of seats available in recent years. From the fact that an association of white contractors sought to have declared unconstitutional the Public Works Employment Act of 1977's 10% minority set-aside provision established by Congress, one might assume that minority contractors have succeeded in cornering the market on federal construction contracts. Untrue. Minority firms got less than 1% of the federal public works money as of 1977; the white contractors got the rest. From the fact that unions were challenging a consent decree entered into by AT&T with federal agencies agreeing to increase women and minorities in its 700,000 person work force, one might not guess that the goal AT&T set for itself was in some cases as low as 3% in areas of high minority population.

Why is it that the person suing Kaiser Aluminum and the Steelworkers is a white worker in Kaiser's Gramercy, Louisiana plant where less than 5% of the supervisors were black until recently? Why is it that the Detroit Police Department where relatively few blacks were in supervisory positions a few years ago, has been sued by white police officers?

Why is it, to sum up, that the judicial reality seems to be so out of whack with what we know to be the facts about racism and sexism in this country and their lingering effects?

Let me repeat. The answer is complicated. But, I think there is an Orwellian explanation for part of this social phenomenon. Now when I say "Orwellian," many of you will think immediately of 1984 and Animal Farm, books by George Orwell that, using differing techniques, forced us to confront the insidious and horrifying character of totalitarianism. I use "Orwellian" here, however, more narrowly. In 1946, Orwell wrote an essay called, "Politics and the English language" in which he argued that the decline of the English language, was both a result and a cause of Great Britain's political and economic disintegration. Let me quote him:

> "In our time, political speech and writing are largely the defense of the indefensible. Things like the continuance of British rule in India, the Russian purges and deportations, the dropping of the atom bombs on Japan, can indeed be defended, but only by arguments which are too brutal for most people to face, and which do not square with the professed aims of political parties. Thus political language has to consist largely of euphemism, question-begging and sheer cloudy vagueness.
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> * * *
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> Political language --- is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind."

Thought, then, can corrupt language. But language can also corrupt thought, says Orwell:

> "A bad usage can spread by tradition and imitation, even among people who should and do know better."

"Very interesting," you are probably saying to yourselves, "but is this what I came all the way to Seattle to hear?" Bear with me.

What I would like to suggest to you today is that language poses an effective impediment to achieving an end to discrimination in America. We who are fighting racism, sexism and other noxious behavior often speak in such vague generalities and euphemisms that we obscure what we are really about. Let me pick an example at random: affirmative action. It is a phrase devoid of precise meaning hence all things to all people. To talk in terms of "affirmative action" when we are, in fact, developing remedies for proven acts of discrimination deprives our actions of the moral and legal force they deserve. With all due respect, since I am a fellow sinner in this regard, even your theme for this conference deserves to be scrutinized: "Equal Opportunity - A National Priority." Do those who already have ample access to the education, jobs, housing and services of this society deserve to be a national priority? I think not. Aren't we really talking about certain racial and ethnic minorities and women who have been the victims of systematic discrimination? Why don't we say so? We talk in terms of the need to hire more minorities and women in situations where they are "underutilized." Don't we really mean that history and common sense tell us that, absent discrimination,

the numbers of such persons would not be so low? We talk about "unvalidated" employment tests having a "disparate impact" upon minorities and women. Don't we really mean that presumptively qualified people who have been the victims of discrimination are being denied jobs in favor of people who have not been based upon a test that supposedly measures "merit." We talk about "economically and culturally deprived persons" when we mean "minorities."

Our continued use of these phrases may make what we do more palatable to some; but I think we lose, thereby, the opportunity to remind the American people that our efforts are directed toward eradicating present discrimination and the vestiges of past discrimination, not playing numerical games. All of this is to say that not all racial and ethnic groups deserve the same degree of remedial assistance, that men do not need the aid that women require in some instances. It is not to say, however, that individuals, whatever their color, ethnic origin or sex may be denied certain benefits in the absence of a need to remedy the effects of past discrimination or for some other compelling need such as achieving "diversity" in the university context.

While we are obscuring the valid and honorable nature of our efforts, those who would prefer to see no further advancement for members of discriminated against minorities and women be-cloud their language with ambiguities like, to quote Orwell, "a cuttlefish squirting out ink" to hide their insincerity. They speak out in favor of "affirmative

action" but against "reverse discrimination." They embrace "equal opportunity" but reject "preferential treatment." They accept "goals and timetables" but not "quotas." They claim to believe in "merit selection" while relying exclusively upon employment and college admissions tests that keep minorities and women out but have not been shown to be valid predictors of performance.

Things turn even worse when we begin to use the language of our opponents, when we begin to deny any desire to practice "reverse discrimination" and eschew "quotas" as an object. We have then been lured into the realm of pure abstraction where language bears little relation to concrete reality. We no longer ask how an attempt to remedy past discrimination - for example a systematic rejection of blacks and hispanics seeking lucrative jobs as over-the-road trailer truck drivers - can be regarded as "reverse discrimination;" we no longer question whether the decision of a court faced with a consistent pattern of resistance to hiring anyone but white males ordering a one-for-two ratio - one black or hispanic for every two whites hired (a one-third ratio) for a short period to bring the employer into constitutional compliance represents the imposition of an impermissible quota? At this point, we have done what Orwell warns against:

> . . . simply throwing your mind open and letting the ready-made phrases come crowding in. They will construct your sentences for you - even think your thoughts for you, to a certain extent - and at need they will perform the important service of partially concealing your meaning even from yourself."

A partial explanation, then, for the fact that the attention of the American people and the courts seems to be focused on the question of whether non-minorities and males are becoming the victims of discrimination is that we have let "ready-made phrases" conceal our meaning even from ourselves, and from others. Hence, at a time when blacks, hispanics, Asian-Americans, Native Americans and women still have a long way to go to overcome generations of blatant racism and sexism, white males see our efforts at remediation as crude power grabs for a "slice of the American economic pie." Ironically, minorities and women have come to view benefits the law requires employers and educational institutions to provide as a form of charitable contribution for which they should be eternally thankful. The victims find themselves praising the discriminators for their "voluntary" efforts and "affirmative action."

It seems to me that we cannot, particularly after Bakke, let our words conceal our meaning from ourselves and from others. We must devote ourselves to reminding America in concrete and specific terms of the many ways in which the present effects of past discrimination remain unremedied. In Bakke, the Supreme Court held first, that race could be considered along with other factors in a state medical school's admission process. Secondly, it concluded that the Davis program illegally denied Allan Bakke admission

and ordered his enrollment. In both instances, Justice Powell cast the deciding vote. Race could be considered, he determined, because universities enjoy the right under the First Amendment to seek diversity, including racial and ethnic diversity, in their student bodies. The Davis program was unconstitutional, Powell found, because Davis was not a competent body to devise remedies for past societal discrimination that excluded whites from consideration. He acknowledged, however, that courts, legislatures and administrative agencies would be competent to make such findings and order appropriate relief. The legality of programs designed to provide increased opportunity for minorities and women may well turn, therefore, on the extent to which past discrimination has been documented and the means employed are tailored to remedying the effects of that discrimination. At the federal level, therefore, congressional findings of past discrimination and the establishment by that body of remedial mechanisms directly - such as in the minority set-aside provision of the Public Works Act - or indirectly through competent administrative agencies like the Equal Employment Opportunities Commission, the Department of Labor under the Executive Order 11246 and Health, Education and Welfare's enforcement of Title VI and Title IX against school systems would appear to meet Bakke requirements to the extent that one reads between the lines in a decision that

speaks directly only to the university admissions question. At the state and local level, you have a major role to play in developing solid programs designed to benefit minorities and women. You can assist your legislatures and city councils in developing legislative records of past discrimination against such groups and in molding remedies to fit that discrimination specifically, not discrimination in general. You can help the search for suitable remedies by documenting the extent to which prior efforts have proven unsuccessful. You can assist employers and educators who want to attack problems of discrimination by helping them structure programs for minorities and women reflective of their unique circumstances. And for those institutions that resist taking any action, you can educate them as to the ways in which their prior practices were discriminatory and in which their present practices reinforce that discrimination. They can be brought to the point of comprehending that so-called "voluntary action" before the sheriff arrives is good business. Where you and your commissions lack broad enforcement powers, we at Justice, the EEOC, Labor, HEW and HUD stand ready to back you up in challenging discrimination based upon race, ethnic origin and sex.

Subsequent decisions of the Supreme Court will undoubtedly clarify constitutional and statutory principles only touched

upon by Bakke. But you should be clear in your own minds that Bakke does not change the law one iota insofar as remedies for past discrimination are involved. We have no cause to worry about the principles themselves; rather, we should concern ourselves with ensuring that what we do and say communicates to America that the job of eradicating the vestiges of past discrimination from our society must be a national priority.